LIBRARY
SUPREME COURT, U. S.

NO. 479

SEP 5 1968
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968

JEREMIAH STAMLER, M.D. and YOLANDA F. HALL,

Plaintiffs-Appellants,

and

MILTON M. COHEN,

Intervening Plaintiff-Appellant,

vs.

HON. EDWIN E. WILLIS, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JURISDICTIONAL STATEMENT

ALBERT E. JENNER, JR.
135 S. La Salle St.
Chicago, Illinois 60603

HARRY KALVEN, JR.
University of Chicago Law School
Chicago, Illinois 60637

RICHARD ORLIKOFF
33 N. Dearborn St.
Chicago, Illinois 60602

Attorneys for Intervening Plaintiff-Appellant

Of Counsel:
ORLIKOFF, PRINS, FLAMM & SUSMAN
33 N. Dearborn Street
Chicago, Illinois 60602

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Constitutional Provisions and Statutes Involved	4
Statement of the Proceedings Below	4
The Questions Presented Are Substantial	9
Summary of the Opinions Below	9
I The Speech Or Debate Clause Does not Apply To Cases Such As This Where Only Injunctive Relief Is Sought And There Is No Risk Of Personal Liability, Civil Or Criminal	11
II The Court Below Was In Error In Dismissing The Action Against The Attorney General And The United States Attorney As Ancillary	15
III The Congressional Defendants Waived Whatever Privilege That May Be Afforded Under The Speech Or Debate Clause	17
IV The Speech Or Debate Clause Protects Members Of Congress Only When Engaged In The Sphere Of Legislative Activity. Since There Was A Substantial Issue Of Fact In The Instant Case As To Whether Members Of This Committee Were So Engaged, It Was Clearly Error For The Court Below To Grant Summary Judgment	20
Conclusion	22

Table of Cases

PAGE

Albert v. Joralemon, 271 F. 2d 236, 240-41 (CA 9, 1959) 19

Bond v. Floyd, 385 U.S. 116 (1966) 14

Dombrowski v. Eastland, 387 U.S. 82 (1967).....12, 16, 17, 20

Gojack v. U.S., 384 U.S. 702 (1966) 14

James v. Powell, 274 N.Y.S. 2d 192 (1966) 14

Kilbourn v. Thompson, 103 U.S. 168 (1880).....11, 16, 17, 20

Long v. Ansell, 293 U.S. 76 (1934) 14

Luscomb v. Bowker, 334 Mass. 468, 136 N.E. 2d 192 (1956) 14, 15

NLRB v. Retail Clerks, 203 F. 2d 165 (CA 9, 1953) adhered to 211 F. 2d 236 (CA 9, 1954) cert. den. 348 U.S. 839 19

Stamler v. Willis, 371 F. 2d 413 (C.A. 7, 1966) 10

Tenney v. Brandhove, 341 U.S. 367 (1951) 12, 21

U.S. v. Brown, 86 F. 2d 798 (C.A. 6, 1936) 19

U.S. v. Cooper, 4 U.S. (4 Dallas 341) 859 (1800) 14

U.S. v. Johnson, 383 U.S. 169 (1966) 12

U.S. v. Oregon Lumber Co., 260 U.S. 290, 301 (1922).... 19

United States v. Rumely, 345 U.S. 41 (1953) 14

Vestal v. C. I. R., 152 F. 2d 132 (C.A.D.C., 1945) 19

Watkins v. United States, 354 U.S. 178 (1957) 14

Yellin v. United States, 374 U.S. 109 (1963) 14

Constitutional Provisions, Statutes and Rules

PAGE

Article I, Section 6, Clause 1 of the United States Constitution 9, 11, 19, 20

Rules 12(g) and 12(h) of the Federal Rules of Civil Procedure 19

In the
Supreme Court of the United States

OCTOBER TERM, 1968

NO.

JEREMIAH STAMLER, M.D. and YOLANDA F. HALL,

Plaintiffs-Appellants,

and

MILTON M. COHEN

Intervening Plaintiff-Appellant,

vs.

HON. EDWIN E. WILLIS, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JURISDICTIONAL STATEMENT

Appellant Milton M. Cohen, intervening plaintiff below, appeals from the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, entered June 26, 1968.

Appellants Jeremiah Stamler and Yolanda F. Hall have submitted a Jurisdictional Statement and the record in this matter, and to avoid repetition and prolixity appellant Milton M. Cohen herewith adopts the Jurisdictional Statement and the record submitted by appellants Jeremiah Stamler and Yolanda F. Hall, as though set out fully herein. Appellant Milton M. Cohen submits this statement to supplement the Jurisdictional Statement of appellants Stamler and Hall, in showing that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW

The opinion of the District Court of the Northern District of Illinois, Eastern Division is not yet reported. Copies of the opinion of the District Court, and the dissent therefrom, are attached to the Jurisdictional Statement of Stamler and Hall as Appendix 1, and a copy of the judgment from which this appeal is taken is attached to said Jurisdictional Statement as Appendix 2.

JURISDICTION

Appellant incorporates by reference herein the statement of jurisdiction set forth in the Jurisdictional Statement of appellants Stamler and Hall. Appellant, with the consent of all parties and with leave of Court intervened in cause 65 C 800 on May 24, 1965, the date said cause was filed, and appellant intervened in cause 65 C 2050 with leave of Court, on December 16, 1965.

Appellant filed his notice of appeal on July 5, 1968. The Judgment of said court dismissing the cases below was entered on June 26, 1968.

QUESTIONS PRESENTED

1. Whether the Speech or Debate clause of the United States Constitution bars actions against members of Congress for declaratory and injunctive relief designed to test constitutionality of Congressional action, or whether the speech or Debate clause is limited to protection against actions that would impose either criminal or civil liability?

2. Whether summary judgment was proper against all defendants in view of the fact that two of the defendants, the Attorney General and the U. S. Attorney, do not come within the terms of the Speech or Debate Clause, and in view of the fact that the relief prayed against them, if granted, would have substantially protected intervening plaintiff's constitutional rights?

3. Whether the Congressional defendants can claim the privilege against suit set forth in the Speech or Debate Clause of the United States Constitution more than three years after appearing in these cases, and after moving to dismiss on other grounds, after defending an appeal to the Court of Appeals for the Seventh Circuit, which Court reversed and remanded these causes to be heard by a three-judge court, after moving to dismiss before the three judge court, on other grounds, and after raising nine affirmative defenses in their answer to the complaints, none of which referred or related to the Speech or Debate clause?

4. Whether in any event summary judgment was proper in view of the contested issues of fact as to the constitutional legitimacy of the Committee's activities?

a. Is there a genuine issue of material fact as to whether the continued course of conduct of the Committee on Un-American activities of the United States House of Representatives has rendered the Act of Congress which established said Committee a bill of attainder in violation of

the provisions of Article I, Section 9, Clause 3 of the United States Constitution?

b. Whether the Act of Congress which established the Committee is so vague and indefinite that it is on its face unconstitutional?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 6, Clause 1 of the United States Constitution, set forth below at page 11.

Rule XI, 18(b), Legislative Reorganization Act of 1946, 60 Stat. 817, 828, the full text of which is set forth in pages 3-4 of the Stamler-Hall Jurisdictional Statement.

STATEMENT OF THE PROCEEDINGS BELOW

To avoid repetition appellant adopts the full statement of facts submitted in appellants' Stamler and Hall's jurisdictional statement; we add statements of those facts which bear directly on this appellant. "Ex. 50, p. ....." refers to the printed Supplemental Appendix filed in the Court of Appeals for the Seventh Circuit in Nos. 15628-9 and 15668-9 (Consolidated); "..... R. ..... p. ....." refers to the volume item and page number of the five volume Record on Appeal filed in this Court by appellants Stamler and Hall.

In his intervening petition appellant alleged that he had been served with a subpoena issued by the Un-American Activities Committee of the House of Representatives which commanded him to appear before the Committee at hearings to be held on May 25, 1965 in Chicago, Illinois. A copy of the subpoena served on appellant is annexed to the intervening petition as Exhibit 1. (1 R. 2, p. 55)

In his intervening petition, appellant identified himself as the executive director of a home for the aged operated by a charitable organization. Appellant holds a Master of Social Studies degree. (1 R. 2, p. 55)

Appellant adopted the substantive allegations of the complaint and prayed that the relief requested in the complaint be granted to him and for his benefit. (1 R. 2, p. 53)

Prior to the scheduled hearings of the Committee for which appellant had been subpoenaed newspaper accounts appeared in the daily and community newspapers in Chicago, Illinois, and in newspapers throughout the United States, identifying appellant as a person who had been named as a Communist to the Committee and who had been subpoenaed to testify before the Committee in a hearing concerned with the investigation of Communist activity in Chicago, Illinois. (2 R. 4, p. 142)

The subpoena served upon appellant did not specify the purpose of the May 25, 1965 hearings nor the subject matter or field of inquiry to be covered by the interrogation of appellant.

Appellant joined in plaintiffs' motion for a temporary restraining order enjoining defendants from convening or proceeding with the hearings for which intervenor had been subpoenaed, from taking any action to require intervenor to comply with or enforce the subpoena served on intervenor, and from seeking or receiving in any hearings evidence concerning intervenor. Appellant also joined in the motions of plaintiffs for the entry of an order requiring defendants to respond to the complaint and fixing the date for convening a three judge court.

The District Court denied the application for a temporary restraining order, refused to convene a three judge court, and dismissed the complaint and the intervening petition.

Appellant attended the hearings of the Committee held at 1212 North Lake Shore Drive, Chicago, Illinois, on May 25, 1965. Prior to the commencement of the hearings counsel for appellant delivered a written request to the defendant Honorable Edwin E. Willis stating that due to a prior trial commitment counsel was unable to be present on that day, and requested that Mr. Cohen's appearance before the Committee be re-set to May 26, 1965 at 2:00 P.M. The Committee announced at the commencement of the hearings on May 25, 1965, that the request had been received, and that appellant would be required to "be personally here and respond to the subpoena." (Ex. 50, p. 340) Appellant was present in the hearing room during all of the hearing conducted on May 25, 1965, without benefit of counsel. (2 R. 4, p. 144)

At the opening of the hearings on May 25, 1965, the subcommittee chairman read a statement purporting to be the purpose of the hearings. This was the first time appellant was made aware of the purpose of the hearings, or of the sub-committee's purpose in subpoenaing him. (2 R. 4, p. 154) The "purpose" as contained in the Committee chairman's statement was vague, and was not limited as to the period of time during which the activities of the witnesses were to be investigated.

At the opening of the hearing appellant requested that the testimony of appellant be taken in Executive Session. This request was denied, as were several other similar requests made on behalf of appellant. (Ex. 50, pp. 338, 341; 2 R. 4, p. 144)

During the hearings appellant was named in numerous questions propounded to witnesses who did not answer any of those questions. (2 R. 4, pp. 147-8, 150-2)

An examination of the record of the hearings themselves reveals that the Committee exploited the use of 5th amend-

ment claims of privilege by other witnesses in order to defame and degrade the appellant. The magic device was the framing of charges in questions put to witnesses known to the Committee to be certain to claim the fifth amendment. The result is that Committee's counsel became for all practical purposes the maker of the charges. To select a typical example from many, the following colloquy occurred during the hearings in a question put to a witness other than the appellant Milton Cohen.

> "Mr. Nittle: Did you and Milton Cohen join this group (North Hyde Park Area Independent Voters of Illinois to work for positions of leadership in conformity with Communistic Party directives or policy."
>
> "A. I avail myself of my previous answers." (Ex. 50, p. 446)

Appellant moved that his testimony be taken in Executive Session pursuant to Rule 26 (m) of the Committee's Rules, that his counsel be afforded the opportunity to cross-examine the Committee's witnesses, and to view the documentary evidence before the Committee, in the event that testimony or the documents implicated appellant. All appellant's motions and requests were denied. Appellant joined in the statements and requests set forth in ¶15(10) of the Complaint in No. 2050, to the effect that since the Committee had already heard in Executinve Session the testimony of the two witnesses on which the Committee relied in subpoenaing intervenor and plaintiff, no legitimate legislative purpose could be served by repeating the testimony in public, and that the only purpose of the hearings was to embarrass, ridicule and expose the witnesses subpoenaed by the Committee. (2 R. 4, pp. 146-7)

The Committee called appellant as a witness on the afternoon of May 26, 1965. Appellant gave his name and address and his counsel identified himself to the Committee. Appellant's counsel thereupon made the following statement to the Committee.

> "This Committee subpoenaed Mr. Cohen to appear before it approximately two weeks ago. A few days after Mr. Cohen received the subpoena, every daily newspaper in Chicago published the fact that he had been subpoenaed. There has been an obvious violation of Rule XVI of this Committee.
>
> "I advise this Committee that Mr. Cohen has intervened in the legal action pending in the U. S. District Court for the Northern District of Illinois entitled *Stamler et al.* v. *Willis, et al.*, 65 C. 800 challenging the right of the Committee to hold this hearing; challenging the validity of the subpoena served upon Mr. Cohen, and asserting by the release of Mr. Cohen's name to the newspapers as a subpoenaed witness the rules of this Committee had been violated and he will be denied his constitutional rights in the event he is required to testify. We hereby stand upon all of the allegations and reasons stated in the *Stamler* complaint, and in the intervening petition presented on Mr. Cohen's behalf. We present a copy of these documents to the Committee at this time (handing complaint and intervening petition to the Committee). In addition, we reiterate Mr. Cohen's request for a hearing in executive session.
>
> "For the foregoing reasons, and until the legal matters we have raised have been adjudicated, I have instructed my client not to answer any questions other than to give his name and address, which he has done. In view of the fact that my client will not answer questions, in view of the fact that we have legal action pending to test the validity of the subpoena, Mr. Chairman, we are going to leave the hearing room and we are not going to participate any further in these proceedings." (Ex. 50, p. 439; 2 R. 4, pp. 148-9)

Mr. Cohen then left the hearing room.

The Questions Presented Are Substantial

Summary of the Opinions Below

The Court below split 2 to 1 in its decision. Judges Hoffman and Napoli voted to dismiss appellants' actions with Judge Cummings dissenting.

Judge Hoffman wrote for the majority. The *sole* basis for the decision as to the Congressional defendants was reliance on Article 1, Section 6 of the United States Constitution, the so-called "Speech or Debate Clause." While acknowledging that there was no Supreme Court precedent which controlled the question at hand, Judge Hoffman nevertheless read the words, "shall not be questioned in any other place," to mean that the members of Congress were thereby immunized from being questioned in a court pursuant to a suit for *injunctive* relief designed to test the constitutionality of their action. He argued that the form of action, whether criminal prosecution, civil suit for damages or suit for injunction, did not affect the scope of the constitutional immunity.

Noting that the case presented a possible conflict between the First Amendment claims of the congressmen on the one hand and the First amendment claims of appellants on the other, Judge Hoffman went on to say: "We find that freedom of expression protected by the Speech or Debate Clause outweighs the similar protection of the First Amendment . . . If that speech impinges upon another's First Amendment rights, the former must prevail." Having disposed of the congressional defendants on the basis of Speech or Debate Clause, the Court below proceeded to dismiss the action against the other defendants, the Attorney General and the United States Attorney, on the grounds that it was "ancillary."

In his dissent, Judge Cummings stressed five points. First, that the congressional defendants by not raising the

issue of privilege or immunity in their answer which urged some nine other affirmative defenses had thereby waived it in this case. Second, that there was no authority for the majority's conclusion; "this review of the leading authorities on the Speech or Debate Clause shows," he said, "that until today no court has aplied it to an action seeking injunctive or declaratory relief." Third, that the construction the majority gave to the Clause was erroneous and unsound and that the Clause should be limited to "judicial proceedings in which individual legislators are sought to be rendered personally liable, civilly or criminally . . ." Fourth, he urged that the majority decision was so inconsistent with *Stamler* v. *Willis,* 371 F. 2d 413 (C.A. 7, 1966), that it was tantamount to evasion of the mandate of the Court of Appeals. "The *Stamler* opinion, contemplated," argued Judge Cummings, "that this judicial re-examination was to occur in this proceeding rather than in subsequent criminal proceedings." Finally, he saw no reason why the suit against the non-Congressional defendants could not stand.

This collision of views makes it evident that this case presents issues which are substantial, unsettled and of high public importance. At issue technically is the construction of a key clause in the United States Constitution and at stake is basic policy affecting whether a witness, summoned before a Congressional committee for an unconstitutional inquiry, has any way of protecting his rights other than to defend them in a criminal proceeding.

I.

The Speech or Debate Clause Does Not Apply To Cases Such As This Where Only Injunctive Relief Is Sought And There Is No Risk Of Personal Liability, Civil Or Criminal.

The central issue on this appeal is the relevance of the Speech or Debate Clause. That clause reads as follows:

> "The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place." Art. 1, Sec. 6, Cl. 1.

The question is whether this clause flatly prohibits any sort of litigation against members of Congress for actions connected with their work in Congress; or whether the clause is to be read as immunizing the members of Congress only so far as is necessary to effectuate a rational policy of protecting them from pressures toward "self-censorship' in the performance of their congressional duties. The Court below, speaking through Judge Hoffman read the clause mechanically as immunizing members of Congress from all such litigation. In this, we submit, the Court is in fundamental error.

The precise question at issue is a novel one. There are only four Supreme Court precedents discussing the Speech or Debate Clause, and none are precisely in point. In *Kilbourn* v. *Thompson,* 103 U.S. 168 (1880), the clause was held to immunize members of Congress for action for *damages* for false imprisonment; there was no occasion for any discussion of the problems presented by a suit for

injunctive relief. In *Tenney* v. *Brandhove,* 341 U.S. 367 (1951), the clause was not directly involved at all since the suit was for *damages* under the Civil Rights Act against members of the California Legislature. The Court noting the Clause as an expression of the privilege of legislators construed the federal statute in question as exempting state legislators from actions for civil liability. Once again, there was no occasion to discuss the issue of injunctive relief. In *U. S.* v. *Johnson,* 383 U.S. 169 (1966), the question was whether evidence of a speech made on the floor of Congress could be used in a *criminal prosecution* of a Congressman for accepting a bribe. The Court held that it could not, relying on the Speech or Debate Clause. Again, there was no occasion for the Court to consider the question of injunctive relief since the problem before it was exclusively one of criminal prosecution.

Finally, in *Dombrowski* v. *Eastland,* 387 U.S. 82 (1967), the most recent pronouncement on the problem, the suit was *in tort* against the chairman of a congressional committee for conspiring with state officials to violate certain property rights of the plaintiff. The Court held that under the circumstances the Speech or Debate Clause immunized the members of Congress from such a suit for damages. Once again, there was no occasion to consider the question of injunctive relief.

This is the sum total of Supreme Court holdings on the issue. It is abundantly clear that all that has been decided is that the Clause immunizes members of Congress from suits which would involve the imposition of criminal or civil sanctions.

In this state of the authorities, where then does one go for a clue as to the true meaning of the Clause? We would suggest two persuasive answers. The first would be found

by giving the clause a rational and functional purpose. In view of its history in the long fight of the English Parliament to achieve independence from the Crown, it would appear that its purpose was to prevent the inhibiting of the members of Congress in the performance of their duties by the threat of litigation which would affect them personally. The purpose, we would suggest, was to relieve the members of Congress of any pressures toward self-censorship. It is thus not surprising that Alexander Meiklejohn has seen it as the paradigm for the protection of free speech. On the view we urge here, the Constitution granted an immunity to the individual legislators which from one point of view is radical indeed, but the important point is that it was immunity from personal pressures and threats that would be generated by litigation which could, in some sense, inhibit or affect the free behavior of the legislator.

The Clause then should be defined and bounded by consideration of its rational purposes. It protects the members of Congress from litigation when litigation would carry some threat to them personally. They cannot be questioned in another place when such questioning might have the consequence of inhibiting them. When, however, as in the instant case, the litigation carries no threat of personal liability or personal sanction against the individual members of Congress but is simply a device to test the quality of their institutional action, there can be no point in immunizing them.

The second and decisive clue to the proper reading of the Clause arises from a consideration of the possibility of challenging congressional committee action by way of defense in prosecutions for contempt of Congress. It is an

unquestioned and longstanding rule that the witness may bring under judicial scrutiny the actions of an investigating committee, that he may thus under these circumstances call into account and question in another place, namely a court, the actions of members of Congress. Cf. *United States* v. *Rumely*, 345 U.S. 41 (1953); *Watkins* v. *United States*, 354 U.S. 178 (1957); *Yellin* v. *U.S.*, 374 U.S. 109 (1963); *Gojack* v. *U.S.*, 384 U.S. 702 (1966); *Bond* v. *Floyd*, 385 U.S. 116 (1966). More important, he may in the course of his defense in the criminal action or in any other lawsuit, subpoena the members of Congress as witnesses. Compare *U. S.* v. *Cooper*, 4 U.S. (4 Dallas 341) 859 (1800); *Long* v. *Ansell*, 293 U.S. 76 (1934); *James* v. *Powell*, 274 N.Y.S. 2d 192 (1966); *Luscomb* v. *Bowker*, 334 Mass. 468, 136 N.E. 2d 192 (1956). The Speech or Debate Clause must then be read in conformance with this rule permitting litigation over the constitutionality of the actions of members of Congress. When the witness litigates against the committee by way of defending in a prosecution for contempt of Congress, the salient facts are that the litigation carries no threat of personal consequences for the members of Congress and that its purpose is to test the legality and constitutionality of official institutional action. In brief "impersonal" litigation does not amount to "questioning in another place."

These two lines of analysis converge, we submit, on the conclusion that the Speech or Debate Clause does not apply to suits such as the instant one, seeking only injunctive relief by way of testing the constitutionality of official action when such suits carry no risk whatsoever of any personal consequences for the individual members of Congress.

And this is the conclusion reached in *Luscomb* v. *Bowker*, 334 Mass. 468, 136 N.E. 2d 192 (1956), a state case construing an analogous provision in the Massachusetts Constitution. In the *Luscomb* case, plaintiff sought declaratory and injunctive relief against members of a legislative investigating commission. The Court held that the Massachusetts "Speech or Debate" Clause was not a bar to the suit, saying:

> "In none of the authorities above cited do we find any support for the proposition that a member of the legislature is exempt from suit by an individual designed to test the constitutionality of action of the legislator." 136 N.E. 2d, at 197.

II.

The Court Below Was In Error In Dismissing The Action Against The Attorney General And The United States Attorney As Ancillary.

The principal concern of the majority opinion is with the constitutional immunity of the congressional defendants. Having discussed this question at some length and reached the conclusion that the congressional defendants were "privileged," the Court at the very end of its opinion in a single sentence dismissed the action against the two non-congressional defendants in the case, the Attorney General and the United States Attorney, with the single assertion that these actions are "ancillary." There was no discussion whatsoever of the issue, no citations to any relevant authorities, no argument for the conclusion.

It is obvious that reasons neither of precedent, nor logic nor policy dictate this result. The suits against the Attorney General and the United States Attorney are not so dependent upon the suit against the congression-

al defendants that they cannot stand alone. More important, if appellants were to be granted relief against the two non-congressional defendants, such relief would, as a practical matter, go a long way toward curing their grievance. It would give them effective protection against the imposition of sanctions on them for refusing to submit to the unconstitutional inquiry of the Committee.

Two Supreme Court precedents, a century apart, demonstrate the relevant principle. In *Kilbourn* v. *Thompson,* 103 U.S. 168 (1880), a suit for damages for false imprisonment was brought against members of Congress and the Sergeant-at-Arms who had physically carried out the Congressional command. The Supreme Court held that Congress was powerless to punish the defendant for refusing to cooperate in its inquiry, since the inquiry itself was an unconstitutional intrusion into private matters. The Court then proceeded to hold that Article 1, Section 6 of the Constitution—the very provision involved in the instant case—gave the members of Congress an immunity against civil actions for damages. Nevertheless—and this is the point for present purposes—it found no impediment to the maintenance of an action for damages against the Sergeant-at-Arms.

In 1967 in *Dombrowski* v. *Eastland,* 387 U.S. 82 (1967), the Court was confronted with a highly analogous problem. The suit was an action for damages against the chairman and counsel of the Internal Security Subcommittee of the Judiciary Committee of the United States Senate on the grounds that the defendants had conspired with Louisiana officials to seize various properties of the petitioners in violation of Fourth Amendment rights. The Supreme Court held that the Speech or Debate Clause provided an absolute immunity to the chairman of the Committee.

Nevertheless—and this is again the point for present purposes—it went on to hold that the Clause did not protect the Committee counsel and that the action against him should not have been summarily dismissed.

If the action against the Sergeant-at-Arms, Thompson, could survive the dismissal of the suit against members of Congress because of their constitutional immunity in *Kilbourn* v. *Thompson;* and if the action against Committee Counsel Sourwine could survive the dismissal of the action against the chairman of the committee in *Dombrowski* v. *Eastland,* it is difficult indeed to understand why in the instant case the actions against the Attorney General and the United States Attorney do not survive a dismissal of the action against the committee members because of their constitutional immunity.

III.

The Congressional Defendants Waived Whatever Privilege That May Be Afforded Under The Speech Or Debate Clause.

Judge Cummings in his dissent argued that the congressional defendants had waived any privilege arising under the Speech or Debate Clause by their extraordinary delay in asserting such a privilege. A brief resume of the chronology of these cases points up how very late the congressional defendants were in makin gtheir point.

Plaintiffs filed their first action on May 24, 1965. On the same day, Judge Hoffman dismised the action. On December 6, 1965, after the Chicago hearings for which plaintiffs had been subpoenaed, plaintiffs filed their second action. The congressional defendants moved to dismiss the second action "for lack of jurisdiction over the subject matter and for failure to state a claim upon which

relief can be granted." (2 R. 4, p. 172) On January 25, 1966, the Congressional defendants filed an amended motion to dismiss "for lack of jurisdiction over the subject matter, for lack of jurisdiction over the parties, for improper venue, and for failure of the complaint to state a claim upon which relief can be granted." (2 R. 4, p. 196) Defendants' motion was granted by Judge Hoffman. In the consolidated appeal of both cases to the Court of Appeals for the Seventh Circuit, defendants briefed and argued a variety of points, none of them claiming immunity of the Speech or Debate Clause. The Court of Appeals reversed the dismissal of the consolidated cases and remanded them to the District Court to be heard before a three-judge court. There the defendants renewed their motion to dismiss, raising the same grounds they had asserted before the single judge. On November 8, 1967, the three-judge court denied the motion to dismiss. At this point, the cases had been in sharply contested litigation for two and one-half years, with the defendants yet to pose the Speech or Debate Clause as a defense.

The congressional defendants then filed their answer denying the allegations of the complaints and raising nine affirmative defenses ranging from improper venue to mootness to "adequate remedy at law." There is no mention in the answer of the congressional defendants to the Speech or Debate Clause. (4 R. 56)

The congressional defendants followed up their answer with a motion for summary judgment again without referring to the Speech or Debate Clause. When the appellants embarked upon discovery in the court below, the congressional defendants, in opposition to discovery, for the first time resorted to the Speech or Debate Clause. In affidavits attached to a motion to stay discovery and dis-

miss suits against them each congressional defendant "assert(ed) my privilege against, and exemption from, any such demand in accordance with the rights, privileges, and immunities conferred upon me by the express terms and provisions of Article I, Section 6, Clause 1 of the Constitution of the United States." (5 R. 91 and 93)

It would seem clear, and this is certainly the way the defendants themselves view the matter, that the Speech or Debate Clause affords a privilege personal to the individual congressman. He may or may not assert it as he wishes. Assertion of this defense should be subject to the customary doctrines of waiver and estoppel. Those doctrines apply to the government as well as to private litigants. See *U.S.* v. *Oregon Lumber Co.*, 260 U.S. 290, 301 (1922); *Vestal* v. *C.I.R.*, 152 F.2d 132 (CADC, 1945); *U.S.* v. *Brown*, 86 F.2d 798 (CA 6, 1936); *NLRB* v. *Retail Clerks*, 203 F.2d 165 (CA 9, 1953) adhered to 211 F.2d 236 (CA 9, 1954), cert. den. 348 U.S. 839. An excellent statement of the doctrine of estoppel that is applicable here appears in *Albert* v. *Joralemon*, 271 F.2d 236, 240-41 (CA 9, 1959). Rule 12(g) and 12(h) of the Federal Rules of Civil Procedure make it clear that an affirmative defense not raised in the answer, or by motion prior thereto, is waived.

---

[1] The Congressional defendants, apparently sensitive to the circumstance that it had become too late to raise the privilege as an affirmative defense sought escape from their awkward position by raising it as a bar to jurisdiction. Judge Hoffman, however, in a complicated maneuver, treats the constitutional claims of privilege "as affirmative defenses to the action and finds on the defendants' motion for summary judgment that the Speech or Debate Clause is a complete legal defense."

The policy behind doctrines of waiver and estoppel are particular relevant in this case where the defendants waited to raise the point until after the loss of three motions to dismiss and an appeal and when they were confronted with the prospect of trial.

IV.

The Speech Or Debate Clause Protects Members Of Congress Only When Engaged In The Sphere Of Legislative Activity. Since There Was A Substantial Issue Of Fact In The Instant Case As To Whether Members Of This Committee Were So Engaged, It Was Clearly Error For The Court Below To Grant Summary Judgment.

The Supreme Court repeatedly has been careful in its decisions under Article I, Section 6 to indicate that there is an outer limit to the scope of the clause and that the limit is set by the legitimacy of the legislator's activity. At some point the individual legislators can be acting so far outside the legislative sphere as to forfeit the protection of the clause.

The rule is restated succinctly in the recent Supreme Court case, *Dombrowski* v. *Eastland,* 387 U.S. 82, 85 (1967):

> "It is the purpose and office of the doctrine of legislative immunity, having its roots as it does in the Speech or Debate Clause of the Constitution, *Kilbourn* v. *Thompson,* 103 U.S. 168, 204, 26 L.Ed. 377 (1881), that legislators engaged 'in the sphere of legitimate legislative activity', *Tenney* v. *Brandhove, supra,* 341 U.S., at 376, 71 S.Ct., at 788, should be protected not only from the consequences of litigation's results but also from the burden of defending themselves."

The point had been first made in passing in *Kilbourn* v. *Thompson,* 103 U.S. 168 (1880) when the court spoke

of actions "of an extraordinary character" for which the members would be liable. It was crystallized in *Tenney* v. *Brandhove,* 341 U.S. 367, where the court after its review of the history, said "We come then to the question whether from the pleadings it appears that the defendants were acting in the sphere of legitimate legislative activity. Legislatures may not of course acquire power by an unwarranted extension of privilege." At 376.

The basic grievance of appellants and their basic challenge to the committee in this case, is that the Congressmen in a variety of ways were not acting with any proper legislative purpose and were infringing individual rights under the First Amendment. In brief, the very point at issue is whether the committee was acting "within the sphere of legitimate legislative activity."

As appellants Stamler and Hall make abundantly clear in their brief and especially in their appendix, dramatic controversial issues of fact as to the legitimacy of the committee's actions are involved in this case and would be presented at trial. Moreover, in their preparation for trial, as the appendix makes clear, appellants were engaged in a painstaking effort to present evidence on the illegitimate conduct of this committee over its history,—evidence which would dramatize *just how illegitimate* the committee activity had been and that this illegitimacy was a *structural, durable characteristic* of the committee's operations and not peculiar to this one case alone. It was therefore entirely improper for Judge Hoffman to attempt to dispose of a question so subject to factual controvedsary by summary judgment.

CONCLUSION

The issues in this case are thus novel, substantial and of high public importance; and Court below was in clear error in its disposition of them. We respectfully urge that this appeal be granted and the order below be removed.

Respectfully submitted,

ALBERT E. JENNER, JR.
135 S. La Salle St.
Chicago, Illinois 60603

HARRY KALVEN, JR.
University of Chicago Law School
Chicago, Illinois 60637

RICHARD ORLIKOFF
33 N. Dearborn St.
Chicago, Illinois 60602

Attorneys for Intervening Plaintiff-Appellant

Of Counsel:
ORLIKOFF, PRINS, FLAMM & SUSMAN
33 N. Dearborn St.
Chicago, Illinois 60602